No. 15243

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT C. KIRKWOOD, Controller of the State of California,

Appellant,

vs.

LEE ARENAS, RICHARD BROWN ARENAS and UNITED STATES OF AMERICA,

Appellees.

Appeals From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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Statement of the Case.

One of the basic issues in the present case is whether the trust allotments issued herein were issued under the authority of the Mission Indian Act (26 Stats. 712) or the General Allotment Act (24 Stats. 388). Consequently, certain statements by the Appellees in their Counter Statement of the Case are not properly included in the Counter Statement of the Case but properly belong to the argument.

The statements referred to are on page 3 wherein it is stated, "This implemented the General Allotment Act by making certain special provisions for the Mission Indians

of California." Whether the Mission Indian Act, as is inferred, merely formed a supplementary part of the General Allotment Act or whether it was an independent statute is one of the issues of the case, and the Controller submits that the statement mentioned above should properly be part of the Argument of the case and not be considered as statement of fact.

On page 5 of Appellee's brief it is further stated, ". . . his rights to allotment and his rights as heir of Guadalupe were adjudged and upheld under the General Allotment Act in the lower Court (60 Fed. Supp. 411), affirmed on appeal in this court (158 F. 2d 730) and certiorari was denied, 331 U. S. 842." Whether or not these rights were granted under the General Allotment Act is one of the main issues of the case, and consequently the Controller submits that such statement and like statements should not be considered statements of fact and are improperly included therein. The Controller submits that such issues are properly matters for the Argument of the Case.

Summary of Argument.

I.

The Mission Indian Act is not to be construed *in pari materia* with the General Allotment Act.

II.

California has the jurisdiction to tax the transfer at death of the trust allotments of Guadalupe Arenas and Eleuteria Rice Arenas.

Conclusion.

ARGUMENT.

I.

The Mission Indian Act Is Not to Be Construed in Pari Materia With the General Allotment Act.

Appellees in their reply brief attempt to first prove that the trust allotments herein were issued under the authority of the General Allotment Act (Appellees' Br. pp. 8-10) and, second, they attempt to show that the Mission Indian Act and the General Allotment Act are *in pari materia* to such extent that the tax exemption section of the General Allotment section is therefore applicable to the trust allotments herein (Appellees' Rep. Br. pp. 10-12).

The Controller submits that a careful reading of *Arenas v. United States,* 322 U. S. 419, clearly indicates that it was the opinion of the United States Supreme Court that the trust allotments for the Mission Indians were to be issued under the Mission Indian Act. In this respect the court stated, 322 U. S. 419 at 432: ". . . It appears that the sole reason for denying a patent is a departmental change of policy, by which the Secretary now disagrees with *the allotment policy prescribed for these Indians by the Acts of 1891 and 1917.*" The Act of 1891 is the Mission Indian Act, 26 Stats. 712, and the Act of 1917 is 36 Stats. 859. The Act of 1917 amended the Mission Indian Act in two ways. First it changed the sizes of the individual allotments to be made and, second, it took away the Secretary of Interior's discretion and directed him to make the allotments. It did not make the Mission Indian Act part of the General Allotment Act. The only reference to the General Allotment Act was that

the size of allotments to be given under the Mission Indian Act were to be the same size as authorized under the General Allotment Act as amended in 1910. That these are the only effects of the Act of 1917 is clearly indicated by the cases. (*St. Marie v. United States,* 108 F. 2d 876 at 880; *Arenas v. United States,* 322 U. S. 419 at 425.)

To state that the Mission Indian Act and the General Allotment Act are to be construed *in pari materia* and construed as one law is to do violence to the intent of congress as evidenced by the individual provisions of each of the individual Acts. If they were to be construed *in pari materia,* why then was it necessary for Congress to adopt the Act of 1917 to change the sizes of the allotments to be awarded the Mission Indians? If the Acts were *in pari pateria,* then the areas governing allotments under the General Allotment Act would govern the allotments under the Mission Indian Act and the Amendment of 1917 would be superfluous. This argument may seem impertinent, for naturally if the Mission Indian Act of 1891 prescribed allotments different in area from the allotments authorized by the General Allotment Act of 1887, then the specific allotments as specified by the Mission Indian Act would apply to the Mission Indians. But that is exactly the point. The Mission Indian Act is a different statute from the General Allotment Act, and as to the Mission Indians the provisions of the Mission Indian Act apply. Therefore when Section 5 of the Mission Indian Act provides that at the end of the allotment period the patent will be conveyed to the individual Indian "free of all charge or incumbrance whatsoever" (Appellant's

Op. Br. pp. 16, 17) it means just that and it does not mean as set forth in Section 6 of the General Allotment Act ". . . and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed . . ." (Appellant's Op. Br. p. 12). If Congress wanted the latter language to apply to the Mission Indians it should have included such language in Section 5 of the Mission Indian Act. It saw fit to use the other language, and therefore as to the Mission Indians, the applicable section is Section 5 of the Mission Indian Act.

But let us assume that Congress saw fit to repeal the General Allotment Act of 1887 in 1920. Would then the right of Arenas be precluded so that he could not have succeeded in establishing his trust allotment as he eventually did? The Controller submits that he would not have been precluded. His right to the allotment accrued under the Mission Indian Act and as long as that Act continued in existence, his right to the allotment could have been established. The repeal of the General Allotment Act of 1887 would in no manner affect his right to an allotment. It is evident therefore that his right to an allotment was founded in the Mission Indian Act.

As pointed out however the repeal of Section 1 of the Act of October 5, 1949 (63 Stats. 705, Ch. 604) (Appellant's Op. Br. pp. 24-26) specifically relating to the taxation of the right of inheritance renders moot the interpretation of Section 5 of the Mission Indian Act and Section 6 of the General Allotment Act. Congress by repealing said statute has indicated an intention not to exclude such taxation from the taxing power of the State of California.

II.

California Has the Jurisdiction to Tax the Transfer at Death of the Trust Allotments of Guadalupe Arenas and Eleuteria Rice Arenas.

In the second and fourth parts of Appellees' Argument, Appellees essentially rest their case on the proposition that California lacks jurisdiction to tax the transfer at death of the trust allotments in question because the trust allotments pass at death by virtue of the laws of the United States. The Controller submits that in spite of this fact California has the right to tax such transfers and this right of California is well grounded in law. The fact that the individual property being considered for taxation passes by virtue of the law of another jurisdiction does not preclude the right of California to assess an inheritance tax where the decedent at the time of death was a resident of California.

In *Estate of Hodges,* 170 Cal. 492, 150 Pac. 344, the decedent died a resident of California. At the time of his death there were located in Massachusetts certain bonds and stocks of foreign corporations, deposits in banks and certain chattels. Said assets remained in Massachusetts and were subjected to ancillary administration in that state. Under that administration all such personal property was transferred to a testamentary trust, which trust remained under the jurisdiction of the Massachusetts courts. At no time did California obtain possession of the assets or at any time was the probate proceedings in California effective to pass the property in Massachusetts. The court held, however, that the transfer of such prop-

erty was subject to an inheritance tax by the State of California by reason of the fact that the decedent was a resident of California and by reason of the doctrine of *mobilia sequuntur personam.* Actually, however, the fact of the matter is that the property passed by virtue of the law of Massachusetts and yet California was acknowledged as having the right to tax the property. The California Supreme Court recognized the doctrine of *mobilia sequuntur personam* for what it actually is, a matter of comity between the states. Actually, although Massachusetts passed the property in accordance with the law of California it was actually passed by virtue of the law of Massachusetts. At 170 Cal. 492 at 499 this principle is clearly enunciated by the California Supreme Court:

> "It is of course true that while the general rule is that the right of succession to personal property is governed by the law of the domicile of the owner at the time of his death and not by the law of its locality, and the right of the state of such domicile under its laws to impose such inheritance tax is sustained for that reason, although the personal property may be actually in another state, *this general rule of succession is subject to the limitation that there be no rule to the contrary in the state where the personal property is actually located. But this limitation cannot apply here because there is no law to the contrary in the state of Massachusetts.* Under a stipulation of the parties in this proceeding it appears that by section 1, chapter 143, of the revised laws of Massachusetts of 1902, if administration is taken there on the estate of an inhabitant of any other state his estate found in Massachusetts must be, after payment of debts, disposed of according to his

last will if he left any, 'otherwise . . . his personal property would be distributed and disposed of according to the laws of the state or country of which he may have been an inhabitant.' As then the law of Massachusetts recognizes the general rule that the disposition by will, or succession thereto on intestacy, as to personal property located in Massachusetts owned by a nonresident of that state, is entirely governed and controlled by the law of the domicile of the decedent, it must necessarily follow as to the particular personal property involved here that the general rule of the authorities applies; that an inheritance tax on personal property of a decedent though located out of the state of his domicile may be imposed on the right of disposition by will or succession on intestacy which is granted under the law of the domicile of the decedent."

The exact same situation exists in the instant case. As in the *Hodges* case, the law of Massachusetts made the law of California applicable, so here in the instant case the law of the United States makes the law of California applicable. The *Hodges* case permitted the taxation of the assets passing by virtue of the law of Massachusetts, and so also it permits the taxation of the assets herein passing by virtue of the law of the United States.

Conclusion.

In conclusion therefore let us consider the essential facts. The decedents in question were at death residents of California. The lands in question are located in California. The Oklahoma Tax Commission cases laid down the rule that such transfers are taxable for inheritance taxes unless there is a specific direction by Congress exempting

such properties from state taxation (Appellant's Op. Br. pp. 10-12). Appellees cannot deny that the transfers in the Oklahoma Tax Commission cases were by virtue of the laws of the United States for at any time the United States can repeal the Osage Allotment Act (Appellant's Op. Br. pp. 27, 28). The Supreme Court saw fit to approve the right of Olkahoma to tax the trust allotments of the Osage Indians even though they passed by virtue of the law of the United States, therefore the fact that the trust allotments of the Mission Indians pass by virtue of the laws of the United States does not preclude the right of California to tax such trust allotments. This decision of the United States Supreme Court is in keeping with the principles laid down by the California Supreme Court in *Estate of Hodges, supra.* The only question at issue therefore is whether Congress has specifically exempted the trust allotments in question from taxation by the State of California. The Controller submits that such exemption has not been given, therefore, the transfers are taxable by the State of California.

Respectfully submitted,

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